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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1177

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED,
Petitioner,

v.

TEXAS POWER & LIGHT COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays this Honorable Court to deny the petition for a writ of certiorari for the reason that no special or important reason exists for a review by this Court of the correct and just decision of the United States Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

As Petitioner failed to set forth the statute herein involved, Respondent will do so. This case involves the construction of 28 U.S.C. Section 1359, reading verbatim as follows:

> "A district court shall not have jurisdiction of a civil action in which a party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. June 25, 1948, c. 646, 62 Stat. 935."

STATEMENT OF THE CASE

Petitioner has not accurately stated the material facts of this case. These facts are: (1.) All of the real parties in interest whom Petitioner represents — all of the statutory beneficiaries under the Texas Wrongful Death Act (Article 4671, *et seq.*, Revised Civil Statutes of Texas) *and* all of the decedent's heirs at law under the Texas Statute of Descent and Distribution (Texas Probate Code, Section 45, Revised Civil Statutes of Texas) who would be entitled to participate in any "possible" recovery under the Texas Survival Statute (Article 5525, Revised Civil Statutes of Texas)[1] — are residents and citizens of the State of Texas; (2.) The decedent

[1] While such is not considered to be of controlling importance, it is most doubtful that Petitioner's Bill of Complaint filed in the District Court is sufficient to allege a cause of action for "conscious pain and suffering" under the Survival Statute. No damages are alleged to result from such; all of the damages alleged are prayed to be apportioned to the statutory beneficiaries under the Texas Wrongful Death Act. Doubtful and speculative pleadings are insufficient. *Brown v. Keene*, 8 Pet. 112, 115, 8 L. Ed. 885, 886 (1834); *Twachtman v. Connelly*, 106 F. 2d 501, 505 (6 Cir. 1939); and *Molnar v. National Broadcasting Company*, 231 F. 2d 684, 687 (9 Cir. 1956).

was a resident and citizen of the State of Texas; (3.) Respondent is a citizen of the State of Texas, being a corporation organized and existing under the laws of the State of Texas and having its principal office and place of business in the State of Texas; (4.) The incident made the basis of Petitioner's suit occurred within the State of Texas; (5.) Joseph E. Bass, a citizen of the State of Louisiana, is an Attorney at Law who was chosen as the Administrator of the instant estate for the purpose of artificially creating diversity of citizenship; and (6.) Counsel for Petitioner has repeatedly admitted in both courts below that a foreign administrator was appointed for the purpose of invoking the jurisdiction of the United States District Court and that no issue would be made concerning any other reasons for such appointment.

Petitioner, of course, offered no evidence of any other reason for the appointment of the foreign administrator. Nor is there any evidence of Mr. Bass performing any duties or acts of administering the affairs of the estate as Petitioner would intimate in his Petition.

The Court of Appeals held the appointment of the foreign administrator for the admitted purpose of manufacturing diversity of citizenship did not give the District Court jurisdiction under 28 U.S.C. Section 1359. The Court of Appeals denied a petition for rehearing en banc as no Judge in active service requested such an en banc hearing.

REASONS FOR DENYING A WRIT

I.

The Court of Appeals correctly interpreted Section 1359, Title 28, United States Code, as requiring the dismissal of the cause.

Prior to the decision in *McSparran v. Weist*, 402 F. 2d 867 (3 Cir. 1968) cert. den. sub. nom. *Fritzinger v. Weist*, 395 U.S. 903, 89 S. Ct. 1739, 23 L. Ed. 2d 217 (1969), with one exception, the various circuits wherein the question was presented held that the motive for the appointment of a foreign representative of an estate was immaterial on the question of Federal diversity jurisdiction. The leading case on this subject was *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (3 Cir. 1959). The third Circuit in *McSparran* made an exhaustive study of the authorities and concluded that although *Corabi* had become the leading case on the point and "the authoritative foundation for the maintenance of 'manufactured' diversity jurisdiction", *Corabi* was ill-decided and brought the Federal judicial system into "disrepute". The Court recognized that *Corabi* unduly limited the meaning and scope of Section 1359, and determined to give the Statute the construction and meaning intended by the Congress. *Corabi* was specifically overruled by the very Court that decided it.

Since the *McSparran* decision, all of the Courts of Appeals wherein the question has been presented have ruled that the appointment of a foreign representative of an estate for the purpose of manufacturing diversity jurisdiction runs afoul Section 1359. The Fourth Circuit followed *McSparran* in *Lester v. McFaddon*, 415 F. 2d 1101 (4 Cir. 1969). The

Second Circuit followed in *O'Brien v. Avco Corp.*, 425 F. 2d 1030 (2 Cir. 1969). It is likewise clear that the Eighth Circuit will also look to the motives behind an appointment of a representative to determine the applicability of Section 1359. *Rogers v. Bates*, 431 F. 2d 16 (8 Cir. 1970). The Fifth Circuit has done nothing more in the case at bar. No case decided by a Court of Appeals subsequent to *McSparran* has failed to adopt the rule of that case.

The Courts of Appeals have adopted the *McSparran* rule because of the soundness of that opinion. The Court in *McSparran* did not question or attempt to change the well-settled rule that the citizenship of the administrator rather than the citizenship of the deceased or his beneficiaries is *generally* controlling in the determination of diversity. The Court did hold that manufactured diversity violates 28 U.S.C. Section 1359. In reaching this sound decision, the Court traced the nature and purpose of diversity jurisdiction. The Court looked to the legislative history to determine the true meaning of the terms "improperly" and "collusively" as used in Section 1359 and concluded that these words could only mean that a "nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest, is improperly or collusively named" (402 F. 2d, pages 872-873). In such a case, the Court noted, the nominal party is not chosen because of his capacity to manage the property of his beneficiary. Further, he is outside the jurisdiction of the Court which is to supervise his nominal activity. In truth, the nominal party is not expected to exercise any real function or duty

but is appointed solely so that his citizenship can be used to create diversity. The Court noted that in such cases the nominal party is no more than a representative of counsel, selected by counsel so as to enable counsel to bring the action in the United States District Court (402 F. 2d, page 873). Such a case violates both the letter and spirit of Section 1359. Such a case is the admitted case at bar.

Manufactured diversity as sanctioned by the pre-*McSparran* cases violates even more fundamental principles of federalism. The Court in *McSparran* cited *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77, 62 S. Ct. 15, 86 L. Ed. 47, 54 (1941). We quote from the opinion of the Supreme Court in the *City of Indianapolis* case, as written by Mr. Justice Frankfurter:

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard L. Rev. 483, 510; Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868; Healy v. Ratta, 292 U.S. 263, 270, 78 L. Ed. 1248, 1253, 54 S. Ct. 700. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * * Due regard for the rightful independence of state governments, which

> should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, supra (292 U.S. at 270, 78 L. Ed. 1253, 54 S. Ct. 700). In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy."

The case at bar is essentially local in nature. All of the real parties in interest are Texas citizens as was the decedent. The accident made the basis of Petitioner's suit occurred in Texas. As in *McSparran*, the underlying reason and purpose for diversity jurisdiction — the prevention of discrimination against out-of-state litigants — is wholly absent in this case.

Not only did the Court in *McSparran* determine that *Corabi* was wrong as viewed from a legal standpoint, but the Court also found it impossible to live with *Corabi* practically. The Court alluded to an American Law Institute study which showed that over one-fifth of the diversity cases pending in a particular United States District Court (the Eastern District of Pennsylvania) were brought by out-of-state personal representatives of in-state citizens against in-state citizens. This same study showed that one out-of-state citizen was the guardian in sixty-one diversity cases pending in that particular District Court. Counsel is not aware of the existence of a similar study with regard to the Eastern District of Texas or with regard to any other District within the Fifth Circuit; counsel, however, doubts that there is anything peculiarly unique or novel about the instant case. The annual report of the Administrative Office

of the United States Courts for the year ended June 30, 1969, which appears in Vol. 56, American Bar Journal, page 87 (Jan. 1970), does reflect that the increases in cases pending in the Courts of Appeals are unprecedented, with the Fifth Circuit having the largest percentage of increase. Increases in the number of cases pending in the District Courts are likewise unprecedented.

Petitioner makes the same error as the Third Circuit acknowledged it had made in *Corabi* when he asserts that the question presented herein is controlled by *Mecom v. Fitzsimmons Drilling Company*, 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931). *Mecom* does not deal with manufactured diversity. In *Mecom*, the attack was made upon the device of appointing an administrator of the plaintiff's estate who had the *same* citizenship as the defendant so as to DEFEAT Federal diversity jurisdiction. Section 1359 has absolutely nothing to do with assignments or other devices made to DEFEAT diversity jurisdiction but only deals with assignments and other devices made to INVOKE diversity jurisdiction. Consequently, Section 1359 is not cited or discussed in *Mecom*. The all-important distinguishing factor between *Mecom* and the case at bar is the act of Congress which denies jurisdiction to the United States District Court where one is made a party to a suit to INVOKE the jurisdiction of such Court. All of the Courts of Appeals that have been presented with this question since *McSparran* have held that an attempt to create Federal jurisdiction by some device without substance is improper or collusive within the meaning of that statute.

Mecom is inapposite to our case; our case is controlled by 28 U.S.C. Section 1359.

Petitioner argues that the Court of Appeals herein has been guilty of "judicial legislation". Giving effect to the intention of the Congress is not a usurpation of legislative authority but is the proper function, duty and responsibility of the Federal courts under the Constitution. The Fifth Circuit in *Caribbean Mills, Inc. v. Kramer*, 392 F. 2d 387 (5 Cir. 1968) affirmed at *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969) rightly characterized the holding in *Corabi* when it stated that "by focusing on the literal meanings of the two words (improperly and collusively), the Court virtually emasculated the statute". Petitioner herein would urge the same emasculation of that Congressional intent. If indeed there has been any "judicial legislation", it is found in those earlier cases which ignore the Congressional intent to preclude manufactured jurisdiction.

Petitioner's contention that the holding herein, is a collateral attack on the validity of the State Court appointment, is also without merit. As held by this Court in *Kramer:*

> "The existence of federal jurisdiction is a matter of Federal, not state, law."

The decision made by the Court of Appeals does not attack or impugn the validity of the appointment of the foreign administrator but only refuses to recognize the administrator's citizenship as being conclusively determinative of the

diversity jurisdiction of the United States District Court. Petitioner is still the administrator and is perfectly free to file his cause in the State Court which is peculiarly capable of handling such local matters. As held in *Kramer*, the validity under State law of the device chosen to manufacture jurisdiction is immaterial; that is not the question.

Article 4675 of the Revised Civil Statutes of Texas, a part of the Texas Wrongful Death Act, provides that the statutory beneficiaries themselves may bring the suit. The administrator is authorized to sue for their exclusive benefit ONLY if the beneficiaries fail to institute suit *and* if they do not request the administrator not to bring suit. Petitioner claims to have pleaded the "possibility" of a recovery for "conscious pain and suffering", which recovery would belong to the decedent's estate.[2] Surely, the jurisdiction of the District Court is not to attach by such a tenuous thread — a pleading of "possibility" which asks for no damages resulting from such "possibility". However, if this "possibility" could be transformed into a well-pled cause of action, still the fact remains that the foreign administrator is a "straw party" selected by counsel so as to enable counsel to bring the action in the United States District Court. Such an appointment for no purpose other than to manufacture diversity of citizenship cannot and does not vest the District Court with jurisdiction if Section 1359 be given the meaning intended by the Congress. Petitioner's "interest" in any re-

[2] Petitioner himself characterizes his pleading as asserting only a possibility of such a recovery. Page 3, Petition For a Writ of Certiorari.

covery for conscious pain and suffering — assuming such to be properly pled — can only be the statutory 5% commission "interest", an "interest" virtually identical to that held insufficient by this Court in *Kramer*. Such commission "interest" would only be a by-product of his selection and appointment. Just as in *Kramer*, the particular assignee (here, administrator) was selected and given this "interest" *only* because counsel desired to use his foreign citizenship in order to manufacture diversity so as to invoke the jurisdiction of the United States District Court.

The Second, Third, Fourth and Fifth Circuits have determined to give Section 1359 the meaning intended by the Congress. The Eighth Circuit has held that it will also look to the motives of an appointment of a foreign representative. Many District Courts have followed. The Court in *Dougherty v. Oberg*, (D.C. Minn. 1969) 297 F. Supp. 635, 636-637 felt compelled to follow the logic of *McSparran* rather than the earlier cases of the Eighth Circuit. *Gilchrist v. Strong* (W.D. Okla. 1969) 299 F. Supp. 804, 805-807 is also a well-reasoned opinion reflecting a careful study of the question and standing for the proper construction of Section 1359.

Indeed, most of the pre-*McSparran* opinions which contain any discussion further than the blind citation of the overruled *Corabi* case are clearly distinguishable from *McSparran* and similar cases. In these pre-*McSparran* cases, the foreign representative was selected for some justifiable reason of substance independent of the consideration of diversity. These foreign representatives were kin to the

decedent, a close personal friend of the decedent or bore some other close personal relationship to the decedent or his family. Such appointments are not improper under Section 1359 and are sufficient to confer Federal jurisdiction under *McSparran* and the other similar cases.

II.

The proper construction of 28 U.S.C. Section 1359 is a just matter for the Federal Courts.

Mr. Chief Justice Burger in his State of the Judiciary Address (Vol. 56, American Bar Journal, page 933, October, 1970) spoke to the problem of the proper functions of the Federal and State Courts:

> "As to the future I can do no more than emphasize that the Federal court system is for a limited purpose, and lawyers, the Congress and the public must examine carefully each demand they make on that system. People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the Federal courts. Some of these problems are local, and we should look more to state courts familiar with local conditions."

The first major problem the Chief Justice stated that had to be rectified is the "friction in relations between state and federal courts".

The problem and its remedy is well-stated in the opinion of this Court in the *City of Indianapolis* case, supra. Con-

gress has provided the means for reducing to a large measure this friction by the enactment of Section 1359. It is now up to the Federal Courts to give Section 1359 the meaning intended by the Congress. This the Court below has done as have all of the Courts of Appeals since the *McSparran* decision. No Court of Appeals has rejected the soundness of *McSparran*.

If a Court of Appeals does reject *McSparran* and holds to the construction of Section 1359 which "emasculates" the intent of the Congress — then, it is respectfully submitted, this Honorable Court *will* need to announce a uniform rule for all of the circuits which gives the statute the meaning intended by the Congress. This time has not yet arrived.

This Court denied certiorari in *McSparran* just two weeks after its decision in *Kramer v. Caribbean Mills, Inc.* No new circumstance has arisen in the eight months since that denial of certiorari as to necessitate or warrant a review of the proper construction of Section 1359. No construction of Section 1359 different from that announced in *McSparran* has since been recognized by any Court of Appeals. The holding of the Fifth Circuit herein does nothing more than to adopt the soundness of the opinions of the Second, Third and Fourth Circuits and the rationale of the opinion of this Court in *Kramer*.

III.

There is no evidence of any hardship in requiring Petitioner to bring his case in the State Court which is peculiarly conversant with such local matters.

Petitioner's case is not barred by limitations. Article 5539a, Revised Civil Statutes of Texas. See in this regard, *Burford v. Sun Oil Co.*, 186 S.W. 2d 306, 314-315 (Tex. Civ. App. 1945, *error ref'd. W.M.*) Similarly, Petitioner has not brought forward any evidence of hardship resulting from requiring him to look solely to the State Court. The most Petitioner can offer is his desire for Federal discovery procedures and a broader base of jury selection. Such "reasons" are

> "* * * a blatant example of precisely the type of forum-shopping that section 1359 and cases like Erie R.R. Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) were designed to prevent." *O'Brien v. Avco Corporation*, 425 F. 2d 1030, 1036 (2 Cir. 1969)".

No discovery has been made or attempted in this case. Indeed, the same Counsel herein represent the beneficiaries of a second person who was killed in the same accident as was John William Morris. Counsel was content to file that second lawsuit in the State Courts and has made wide use of the discovery techniques available through the Texas Rules of Civil Procedure.

CONCLUSION AND PRAYER

Certiorari should be denied for at least three reasons.

First, the decision of the Fifth Circuit herein is correct. It gives effect to the Congressional intent as expressed in 28 U.S.C. Section 1359. Further, it gives effect to the even

more fundamental principle of federalism by which Federal Courts are to leave such local matters to the State Courts so as to keep themselves free for their overly-burdened docket of distinctively federal business and cases wherein the need for diversity jurisdiction is both real and substantial.

Second, there is no need for this Court to exercise its power of supervision over the circuit courts. The erroneous construction of Section 1359 which emasculated the Congressional intent was a creature of the circuit courts. The circuit courts have now corrected such erroneous interpretation and, since *McSparran*, have unanimously adopted that construction of Section 1359 as gives effect to the intent of the Congress.

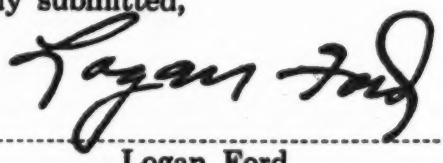
Third, Petitioner has offered no evidence of any hardship by the requirement that he bring his suit in the State Courts. The most Counsel can offer are the repeated admissions that he was forum-shopping and that he procured the appointment of the foreign administrator in an effort to manufacture diversity jurisdiction.

Counsel has admitted that "the motivating purpose for the appointment of the Louisiana administrator was to authorize the bringing and maintenance of the cause in the United States District Court instead of the state district court" (Page 2, Respondent's Response to the Petition for Permission to Appeal filed in Court of Appeals). Counsel has likewise admitted that he would make no issue as to any other considerations for such appointment. If 28 U.S.C. Section 1359 is to be given the meaning intended by Con-

gress (or, indeed, any meaning at all) this case can only be termed a case of manufactured diversity proscribed by that statute.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the just and correct decision of the Court of Appeals be left unimpaired and that this Honorable Court DENY a writ of certiorari in this case.

Respectfully submitted,



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CERTIFICATE

The undersigned certified that on the 13th day of January, A.D., 1971, he did mail, by first class United States mail, postage prepaid, three copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to W. James Kronzer, Esq., Counsel for Petitioner.

Logan Ford

APPENDIX OF STATUTES NOT HERETOFORE REPRODUCED IN THIS BRIEF

Article 4675, Revised Civil Statutes of Texas:

"Actions for damages arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused or by either of them for the benefit of all. If none of said parties commence such action within three calendar months after the death of the deceased, the executor or administrator of the deceased shall commence and prosecute the action unless requested by all of such parties not to prosecute the same. The amount recovered shall not be liable for the debts of the deceased."

Article 5539a, Revised Civil Statutes of Texas:

"When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to have been in intentional disregard of jurisdiction."

CERTIORARI DENIED

N.C.R.